

The Appeals Board has reviewed and considered the record presented to the Administrative Law Judge and listed in his Award. The Appeals Board has also adopted the stipulations by the parties as stated in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge found that claimant was entitled to benefits for two scheduled injuries, one to the left upper extremity and the other to the left lower extremity. Claimant contends the award should be for a general body disability and that he is entitled to work disability. Respondent argues that the award should be limited to one for disability to the left upper extremity only. Respondent also argues that the award should be limited to functional impairment and that in any event claimant should not be granted benefits for a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the issues and arguments presented by the parties, the Appeals Board finds and concludes:

Claimant should be entitled to benefits for a 15 percent permanent partial general disability. The disability should be based upon functional impairment, and claimant should not be granted benefits for a work disability.

Claimant injured his left arm on a grinder being operated by a coworker. Claimant was referred initially to Dr. Rizza and then to Dr. Claassen. Dr. Claassen treated the initial injury and referred claimant to Dr. Lucas. Dr. Lucas ultimately diagnosed injury to the radial nerve and performed surgery to excise a neuroma. The surgery required that he graft a section of nerve from claimant's left lower extremity into claimant's left upper extremity.

There is no dispute that there was permanent disability resulting from a disability in the left upper extremity. The dispute concerns whether there was disability in the left lower extremity as a result of the graft taken, and, if so, whether the disability should be treated as a general body disability or as two separate scheduled injuries.

The Administrative Law Judge found there was some impairment of function to the left lower extremity, and the Appeals Board agrees. Although Dr. Lucas initially testified that he did not believe there was any functional impairment, he acknowledged that there is a neuroma sensation or decrease in sensation at the area of the donor site. Dr. Lucas issued a letter rating the impairment at 1 percent. In his deposition he acknowledged the AMA Guides provide for a 5 to 15 percent rating for injury to the sural nerve, the nerve involved here. Dr. Lucas testified that he believed that was too high, but 1 percent might be appropriate. Dr. Lucas also testified that in his opinion claimant has a 9 percent impairment of the left upper extremity.

Ernest R. Schlachter, M.D., examined the claimant at the request of claimant's counsel. He noted that the current complaints include the inability to straighten the left

thumb and ring and little fingers, weakness in the grip of the left hand, numbness of the little and ring fingers, as well as pain in the left leg. He rated the impairment as a 10 percent impairment to the left lower extremity and a 21 percent impairment to the left upper extremity. He combined these ratings for a 15 percent permanent partial general body disability and recommended that claimant avoid gripping, grasping, or twisting with his left hand; lifting over 10 pounds frequently or 20 pounds on an occasional basis with his left arm; and avoid the use of vibratory tools and cold environments. The Appeals Board finds claimant has, as a result of his work-related injury, a 15 percent general body functional impairment.

In the Award, the Administrative Law Judge reviews Kansas case law to determine whether an injury to an upper and a lower extremity should entitle the claimant to an award for general body disability or two separate scheduled injuries. The Administrative Law Judge notes no controlling case law directly on point. The Appeals Board agrees. The Administrative Law Judge suggests that the injuries should be treated as two separate scheduled injuries. He does so in part on the basis of Quinones v. MBPXL Corp., 10 Kan. App. 2d 284, 697 P.2d 891 (1985). In that case the facts were substantially similar with those here. The claimant injured his right arm and as a result a nerve graft was grafted from his left leg. The Administrative Law Judge awarded benefits for permanent partial general body disability. The Director and District Court subsequently awarded benefits solely for injury to the upper extremity, finding there was no showing of permanent impairment to the lower extremity. The Kansas Court of Appeals noted that claimant did suffer from a loss of sensation and concluded this loss should be treated as a permanent impairment. Without stating whether the injury should be treated as two scheduled injuries or, in the alternative, a general body disability, the Court of Appeals remanded the case for determination of the extent of disability. The Appeals Board does not consider this decision to provide any specific direction on the issue.

Claimant's counsel cites several cases involving simultaneous injury to two of the same injured members. In those cases the award has been for a disability to the body as a whole. See Hardman v. City of Iola, 219 Kan. 840, 842, 549 P.2d 1013 (1976) and Murphy v. IBP, Inc., 240 Kan. 141, 143, 727 P.2d 468 (1986). Claimant's counsel also points to the language of K.S.A. 44-510c(a)(2) which provides in part as follows:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability." (Emphasis added.)

As the decision cited by claimant's counsel indicates, treatment of two of the same scheduled members as a general body disability is based, in part, on the fact that loss of two of the same scheduled members equates to total disability which is an unscheduled

or general body disability. Claimant's counsel also argues that the language "or any combination thereof" suggests that this statute similarly supports awarding general body disability in cases involving two different scheduled members. The Appeals Board recognizes that the language is subject to at least two separate meanings. The language could refer back to the previous language to suggest that any combination of both eyes, both hands, both arms, both feet, or both legs would also constitute, in the absence of proof to the contrary, permanent total disability. In the alternative, this language could be read to suggest that the combined loss of any of the listed scheduled members would constitute a permanent and total disability, again in the absence of proof to the contrary.

The Appeals Board acknowledges that neither the statute nor the Kansas Appellate decisions provide a definite answer to this question. The Appeals Board has, however, ruled on this issue in previous cases and has concluded, however, that simultaneous injury to two different scheduled members should be treated the same as simultaneous injury to two of the same scheduled members. Both should be treated as injury to the general body. The simultaneous injury to two separate different scheduled members is, in effect, an unscheduled injury. The Appeals Board, therefore, finds and concludes that the award should be based on a general body disability. Macias v. GEC Precision Corporation, Docket No. 154,166 (June 1994).

The Appeals Board agrees that the award should be limited to functional impairment and that claimant is not entitled to work disability. The evidence establishes that after being released from surgery, claimant did not initially return to work. Very shortly after returning to light duty, he got into an argument with his supervisor. The argument apparently started when the supervisor suggested that claimant should be wearing boots rather than tennis shoes. Claimant had been advised to wear tennis shoes because of his injury, but the employer had not been advised of this. When claimant advised the supervisor of the medical restriction, the supervisor proceeded to give claimant directions regarding the work to be done. The supervisor testified that he intended to permit claimant to continue to work. Claimant, however, became upset and began swearing at his supervisor. Claimant was then terminated for swearing at his supervisor. The evidence indicates that claimant would have otherwise been permitted to continue to work at a comparable wage. Even though he subsequently earned less than 90 percent of his preinjury wage, the award should be limited to functional impairment based upon the principles stated in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

AWARD

WHEREFORE, the Appeals Board finds that the Award by the Administrative Law Judge should be modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bryan W. Jacobson, and against the respondent, Idaho Timber Corporation, and its insurance carrier, Argonaut Insurance Company, for an accidental injury which occurred February 2, 1995, and based upon an average weekly wage of \$240.84 for 5 weeks of temporary total disability compensation at the rate of \$160.57 per week or \$802.85, followed by 62.25 weeks at the rate of \$160.57 per week or \$9,995.48, for a 15% permanent partial general disability, making a total award of \$10,798.33, all of which is currently due and owing and should be paid in one lump sum less amounts previously paid.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
David M. Druten, Kansas City, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director